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FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

vs.

L. BOOKS & SON LUMBER COMPANY.

[redacted]

Answer of the Fidelity & Deposit Company
of Maryland to the Petition of the
L. Books & Son Lumber Company.

[redacted]

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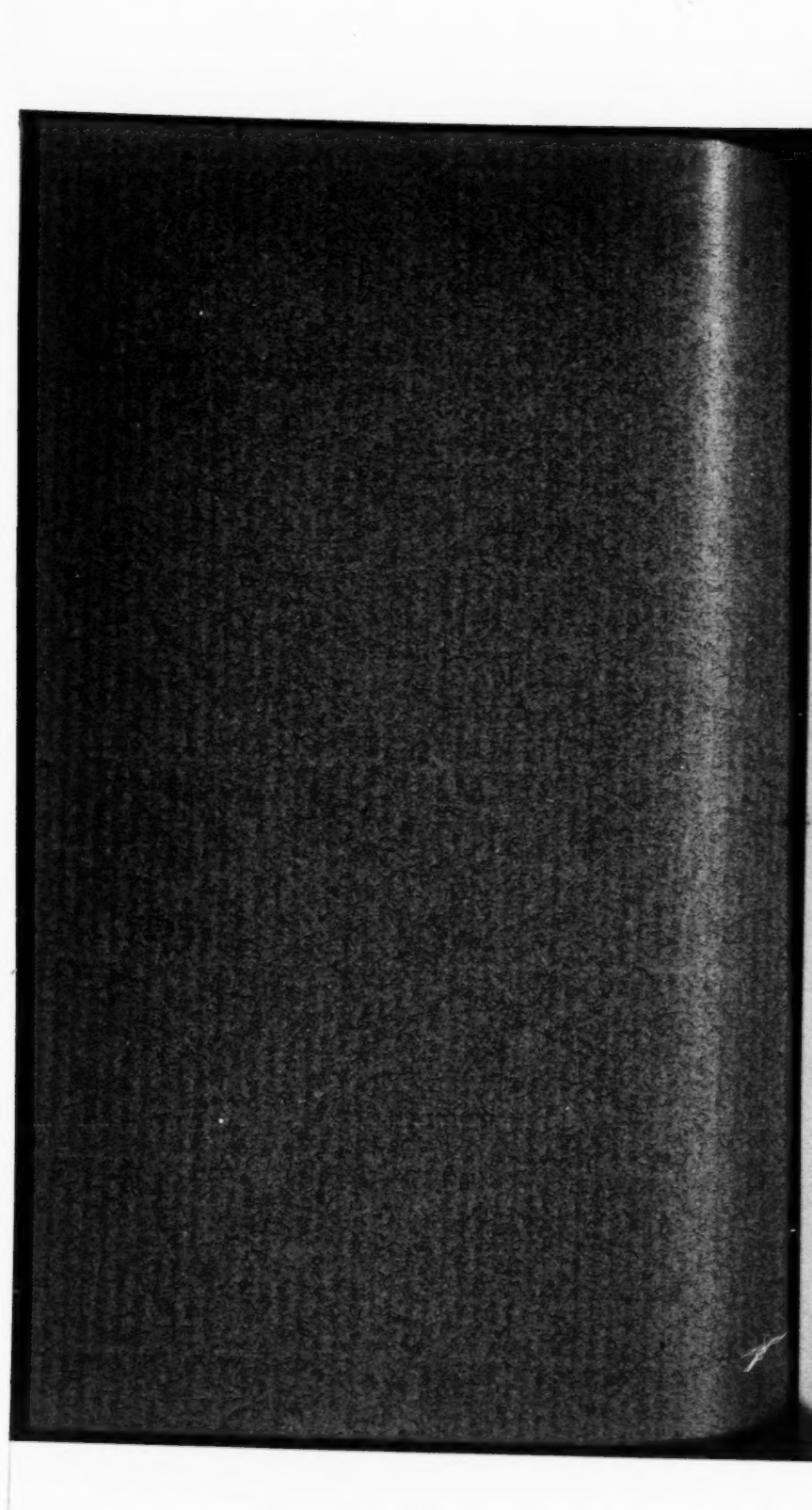

In the Supreme Court of the United States.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

vs.

L. BUCKI & SON LUMBER COMPANY.

UPON CERTIORARI.

The Answer of the Fidelity & Deposit Company of Maryland to the Petition of the L. Bucki & Son Lumber Company.

On October 1, 1897, the writs of attachment for $9,980.80 and $75,000 respectively, were levied on the logs and lumber of the Bucki Company, situated at its mill, and the writ for $75,000 was levied on the sawmill plant at the same time. The sawmill plant was a fixture, and constituted part of the realty. Under the Florida Statute, it is provided that realty shall not be taken possession of under a writ of attachment, and that the writ shall constitute a mere lien on the property. The Sheriff accordingly did not take possession of the plant, or prevent its operation. On October 9, 1897, the levy made under the attachment

for $9,980.80 was released by the giving of a forthcoming bond, and on October 11, 1897, the Sheriff permitted the Bucki Company to take possession of the logs, and convert them into lumber, and also permitted said Company to load its lumber on vessels as fast as they arrived. The mill was operated continuously under this arrangement till about November 7, 1897, by which time all logs in the boom on October 1, 1897, had been sawed up. The mill then closed down until November 12, 1897, when it was again started up and run until November 16, 1897, during which time it sawed up 400,000 feet of logs purchased by the Bucki Company after October 1, 1897. The mill was not run by the Bucki Company after November 16, 1897, because of its inability to procure an adequate log supply to operate its mill. On November 4, 1897, all the logs, lumber and personal property seized under the writ for $75,000 were released on a forthcoming bond. None of the logs, lumber or personal property deteriorated in value while under attachment, and prior to January 1, 1898, all the lumber had been sold and shipped away from the mill, except a lot of old and second-class lumber. There was no evidence which tended in any wise to show that the lumber brought any less than could have been procured for it had no attachment been levied. On or about February 20, 1898, the Bucki Company leased its mill for one year at the rate of $1,000 per month, and the lessee testified that he sustained a loss of $18,000 upon the operation of the mill that year. On February 5, 1899, the mill was sold at execution sale, issued upon a judgment obtained subsequent to October 1, 1897.

During the trial of the action upon the attachment bond, the Circuit Court permitted the Bucki Company to attempt to prove the following things :

1. That prior to October 1, 1897, it had been making a profit upon its business.

2. That prior to June 1, 1897, it had had a good

credit, and that subsequent to the attachment it had been unable to operate its mill for lack of credit, or the means wherewith to supply its mill with logs.

3. That on October 1st it had on hand certain orders for lumber which it had been unable to fill, owing to its inability, through lack of credit, to procure the logs from which to manufacture the same.

4. That the levy of the writ of attachment had prevented the Bucki Company from consummating a loan for $25,000.

5. That the Bucki Company had a number of persons in its employ, to whom it paid salaries during the time the mill was shut down, and that it employed certain watchmen to watch the mill during the time the lien of the attachment continued.

It appeared from the undisputed evidence that the commercial paper of the Bucki Company had been going to protest at intervals since June 1, 1897, and that on October 1, 1897, there was a piece of commercial paper for $5,340.75 which had been outstanding under protest, and unpaid since August 26, 1897, and that on October 1, 1897, the Bucki Company had in cash only $112.50.

The Court made the following order in reference to the testimony admitted:

"This cause coming on to be heard on a motion of the defendant's attorney to exclude certain testimony from the jury, and it being considered that under the testimony introduced, any damages arising from consideration of injury to credit, or loss of profits, would be too remote, uncertain and speculative, it is therefore ordered that this motion be granted, as to the testimony relating to the cost of manufacturing of lumber, and the supply of timber lands, all testimony as to the damage to credit and loss of profits, and all evidence relative to the market prices of lumber subsequent to the attachment. That in regard to the

profits plaintiff's mill had been making prior to October 1st, 1897, be retained and considered only for the purposes of determining the actual damages suffered during the time the operation of the mill was suspended, on account of the attachments, and the motion be denied in all other respects."

But notwithstanding this order, the Judge gave the jury a number of instructions which permitted them to assess damages on account of injury to business and lost profits, and the jury were undoubtedly largely influenced by these charges, and by the evidence admitted and subsequently ruled out. Five of these charges may be taken as specimens:

"Another element of damages claimed by the plaintiff is that the attachment interrupted its business, and by such interruptions and the consequences thereof, resulting from the attachments, the plaintiff was prevented from sawing and shipping lumber to certain parties in Baltimore, New York and Boston, which plaintiff agreed to furnish prior to October 1st, 1897; that losses consist of certain amounts the purchasers of the lumber had to pay to supply what they had purchased of plaintiff. The Court instructs you that the defendant is liable for all such losses, if any resulted as a direct consequence of the two attachments."

"You are the exclusive judges of the facts of this cause; you are the exclusive judges of the amount of damages the plaintiff sustained as the direct and proximate consequence of the issuing and levying of these writs of attachment. These damages consist of two general consequences: 1st. All moneys paid out and all expenses incurred in and about and attending to the preparation of the trial of the motions to dissolve the attachments, and on the trial of such motions, which become reasonably necessary as a direct consequence of such attachment. 2d. All consequential damages—that is, all damages caused by the interruption of the plaintiff's business, either by disabling the

plaintiff from operating its mill, or disabling it to deliver timber and lumber it had agreed to deliver prior to October 1st, 1897, if you believe from the evidence that direct and proximate effect of such attachments caused such interruption of the plaintiff's business."

"One of the principal points in this action is as follows: The plaintiff claims that it should be compensated for the loss of the use of its mill properties, caused by these attachments. The defendant claims that the plaintiff is not entitled to be compensated for the loss of the use of its mill properties, in consequence of the attachment, because, the defendant asserts, the plaintiff was in such financial condition that it could not have continued in business, even if the attachments had not been issued and levied. This is a question of fact for you to determine upon all of the evidence in the case, and if you believe, from all of the evidence in the case, that if these attachments had not been issued and levied upon the plaintiff's properties, it (the plaintiff) would have been able to continue in business, then you will find against the defendant on this contention, and award to the plaintiff such an amount of damages as, upon the evidence, you feel convinced the plaintiff sustained, as a direct and proximate consequence of these attachments."

"The Court instructs you to award damages to the plaintiff, which it sustained by reason of, or in consequence of, the levy of the attachments upon all the timber and lumber and logs attached and to award such damages for the entire period of time the lien of the said attachments remained and continued upon the said timber, lumber and logs, considering any deduction from such damages from the fact of the forthcoming bonds, or indemnity bonds, were given by the plaintiff."

"It is your province and duty to determine under the evidence the length of time this attachment lien

remained upon and continued operative upon the property attached."

The Fidelity Company assigned error upon the charges upon its writ of error, and as pointed out by Judge Shelby in his dissenting opinion, the charges were in direct conflict with the decisions of the Supreme Court, and indeed, with the exception of Alabama, Kentucky and Tennessee, where exemplary damages by statute may be recovered on an attachment bond, there is only one State where such a charge would be upheld.

On page 8 of its petition, the Bucki Company alleges that the trial judge explained that he meant to instruct the jury to allow damages for interruption to business, for the period intervening between October 1 and October 11, 1897. There is nothing whatever in the record to justify this statement. The fact is, that at the time the trial judge ruled out the evidence referred to in the petition, and in answer to an inquiry of counsel, the judge remarked that it was with reference to that period that the evidence of profits was to be considered, but this remark was made on the day preceding that upon which the judge instructed the jury, and the heavy damages assessed show conclusively that the jury took advantage of the great latitude which the charges subsequently given allowed them.

It did not seem to counsel for the Fidelity Company that the right to recover damages on an attachment bond for injury to business, presented a question of such novelty as would justify this honorable Court in granting a writ of certiorari; and for this reason any reference to the assignments of error on this point was omitted. The Fidelity Company would welcome an opportunity to submit its assignments of error to this honorable Court, and would not oppose an order giving the Bucki Company leave to argue its assignments of error, provided the order gives the Fidelity Company leave to argue its assignments of error to the

charges actually given, relative to the measure of damages. And as this honorable Court will have all of the assignments of error and bills of exception of both parties before it upon this certiorari, this might be done. There can be no question that the Fidelity Company should be permitted to submit all of its assignments of error, if the Bucki Company is allowed to submit theirs.

Respectfully submitted,

RICHARD H. LIGGETT,

Counsel for Fidelity & Deposit Company of Maryland.

STATE OF FLORIDA, }
DUVAL COUNTY. } *ss.*

I hereby certify that on this 1 day of February, 1902, in the State and County aforesaid, before the undersigned, personally came Duncan U. Fletcher, who made oath before me that he is a local director for the Fidelity & Deposit Company of Maryland, and that he is informed and believes that the averments of the foregoing answer are true.

D. U. Fletcher

Sworn and subscribed before me this 1 day of February, 1902.

Russell C. Coleord

Notary Public, State of Florida.